

# PUBLIC RISK



Published by the Public Risk Management Association ▶ [www.primacentral.org](http://www.primacentral.org)

NOVEMBER/DECEMBER 2013



## » THE AMENDED AMERICANS WITH DISABILITIES ACT

### Shifting Obligations for Human Resource Management

---

**MILLENNIALS FACE HURDLES  
BREAKING INTO PUBLIC SECTOR**

---

**LIKE IT OR NOT, HERE THEY COME!**

Citizen Volunteers in Times of Disaster

---

# THE AMENDED AMERICANS WITH DISABILITIES ACT: SHIFTING OBLIGATIONS FOR HUMAN RESOURCE MANAGEMENT

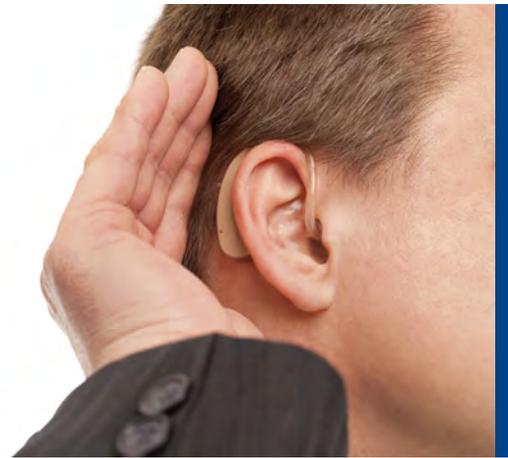
By Michael Otworth,  
CPCU and  
Benjamin C. Eggert, Esq.

By now, public entities might reasonably expect that their obligations under the Americans With Disabilities Act—which is better known as the ADA—would be well settled given that the statute was enacted more than 20 years ago. But recent amendments to the ADA and strategic enforcement priorities announced by federal officials have left public entity employers with shifting and emergent obligations to their actual and prospective employees.

This article will summarize the history of the ADA as well as recent amendments to the statute, then survey employers' developing responsibilities under the amended ADA together with practical strategies for public entities to address their shifting obligations.



**On a basic level, virtually every aspect of the relationship between a public entity and actual or potential employees may be affected by the ADA. Like other employers, a public entity may be required to provide modifications or adjustments to a job, application, process or work environment that will allow a qualified person with a disability to enjoy the benefits and privileges of employment.**



## **BRIEF HISTORY OF THE ADA**

So let's start with the basics. What is the ADA? Passed in 1990, the ADA prohibits discrimination on the basis of disability by all state and local governments, regardless of size (and most private entities as well). In the employment context, the ADA protects qualified individuals with disabilities that can perform the essential functions of a job with a reasonable accommodation.

On a basic level, virtually every aspect of the relationship between a public entity and actual or potential employees may be affected by the ADA. Like other employers, a public entity may be required to provide modifications or adjustments to a job, application, process or work environment that will allow a qualified person with a disability to enjoy the benefits and privileges of employment. Examples might include: making facilities physically accessible, restructuring job responsibilities, modifying work schedules and acquiring equipment.

While these protections were built into the statute, many lawsuits challenged the application of the ADA and courts narrowed the protections of the statute. Two suits in particular dramatically limited claimants' ability to bring ADA claims. In *Sutton v. United Airlines* (1999), the United States Supreme Court held that mitigating measures can eliminate a person's classification as disabled. In other words, if a device could mitigate the effects of disability, then the person is not considered disabled.

And in *Toyota v. Williams* (2002), the United States Supreme Court held that demonstrating a disability under the ADA requires a demanding standard and it is not enough for an individual to be severely limited in the workplace; he or she must be severely limited everywhere. Together, *Sutton* and *Toyota* made it extraordinarily difficult

to bring a disability claim under the ADA except in the most egregious situations.

## **RECENT AMENDMENTS TO THE ADA**

*Sutton* and *Toyota* highlight the reasons why the ADA was broadened in a variety of ways in 2008 when Congress enacted an amended statute. Under the amended ADA, determining whether a person is disabled is now a much easier threshold to reach.

The amended ADA now includes a non-exclusive list that encompasses a range of actions and bodily functions that may qualify a person as disabled. In other words, virtually anything that people do (such as seeing, hearing, sleeping, eating, lifting and breathing) and anything that bodies do (such as functions of the circulatory, endocrine, digestive or neurological system) may now be considered a disability. After these amendments, a huge range of medical conditions may be covered by the ADA and an individual may be considered disabled even if not outwardly so. For instance, an individual may now be considered disabled for a medical condition such as diabetes despite the fact that the person doesn't show any visible disability.

What is important to remember here is that the amended ADA shifts the focus away from establishing a disability to whether a reasonable accommodation would enable the employee or applicant to perform the job— that is, the employer's response to a request for an accommodation, not on the whether the person is disabled in the first place.

## **EMERGING ISSUES UNDER THE AMENDED ADA**

In the last year, the EEOC and court decisions have shown how the amended ADA can impact employers in myriad

There are two lessons that can be drawn from *Keith v. Oakland County*. First, all stereotypes—even those “confirmed” by outside advisors—are very dangerous legally; an employer cannot draw broad conclusions about job performance based simply on a person’s condition. Second, the interactive process under the ADA involved in addressing a request for a reasonable accommodation is critical.

ways. Like many governmental organizations, the EEOC periodically develops plans to establish goals for its activities over extended periods. In December 2012, the EEOC issued a “strategic enforcement plan,” which provides a roadmap of its enforcement priorities between 2013 through 2016.

The EEOC has signaled a variety of areas that it will emphasize in enforcement activities: for example, the EEOC expects to focus on potential discrimination in recruitment and hiring, obtaining equal pay across different groups of workers and protecting access to the legal system by targeting policies that are perceived to discourage employees or applicants from exercising their rights under the amended ADA.

Moreover, the general counsel of the EEOC has indicated that it will place a greater focus on ADA litigation involving those classes of person given little protection under old law—diabetes, epilepsy, cancer, intellectual disabilities. The EEOC also will pay close attention to recent court decisions and new legal theories affecting workplace discrimination.

Court decisions likewise highlight emerging issues under the ADA. In *Keith v. Oakland County* (6th Cir. 2012), the Oakland County government in Michigan—like local governments nationwide—operated a pool. And like any public pool, it needed life guards. Nicholas Keith has been deaf since his birth in 1980; he communicates primarily by using American Sign Language (ASL), but he can detect noises, including loud voices, through an ear implant. Keith enrolled in and successfully completed a junior lifeguard training course using an ASL interpreter to relay verbal instructions to him.

While he needed an interpreter for instructional purposes, he executed all lifesaving tasks and training techniques

himself. Upon successful completion of the training, Keith applied for a part-time lifeguard position at the county’s wave pool, asking only that an ASL interpreter be present at staff meetings and further classroom instruction. Katherine Stavale, the county’s recreation specialist, offered the position to Keith, contingent upon a pre-employment physical.

Upon learning that Keith was deaf, the physician performing the physical disqualified him. Oakland County did not immediately disqualify Keith based on this report, however. The county contacted a risk management consulting firm who regularly advised the county regarding its water park, pools and other aquatic facilities. Unfortunately, these consultants (1) never met Keith, (2) had no experience accommodating deaf individuals in aquatic settings and (3) performed no research regarding the same. The risk management firm simply “expressed concern” over Keith’s ability to “be responsible for a lifeguard stand by himself.”

Based on the reports of both its physician and its risk management consultants advising against hiring Keith, the county withdrew its offer of a lifeguard position based solely on his disability and in spite of the fact that he had completed all the necessary training. The United States Court of Appeals for the Sixth Circuit held that the county failed to make an individualized assessment under the ADA of Keith’s fitness to work as a lifeguard and whether a reasonable accommodation was necessary, because neither the doctor nor the consultants made an effort to determine if the plaintiff could serve as a lifeguard despite his deafness. In other words, they simply concluded summarily that a lifeguard could not perform his job responsibilities without being able to hear.

There are two lessons that can be drawn from *Keith v. Oakland County*. First, all stereotypes—even those “confirmed” by outside advisors—are very dangerous legally; an employer cannot draw broad conclusions about job performance based simply on a person’s condition. Second, the interactive process under the ADA involved in addressing a request for a reasonable accommodation is critical. What this means is that public employers must precisely address whether and why a prospective or current employee cannot perform a job—ideally with specific reference to a person’s job responsibilities and the request for accommodation. Again, *Keith v. Oakland County* highlights that request for accommodation and potentially resulting discrimination claim are mostly likely going to turn on the request for accommodation and the employer’s response, not whether the person is considered “disabled” and what that really means in practice.



### PRACTICAL STRATEGIES FOR PUBLIC EMPLOYERS

What does all of this mean for public entities? Given the amendments to the ADA and the EEOC's potential enforcement priorities, public entity employers likely will face increased scrutiny as to their workplace policies and procedures. To help mitigate their risks, public entity human resource departments may consider a variety of activities, conducted in conjunction with legal counsel, to mitigate legal risks and exposures.

❶ **Review ADA Policies.** While many public entities may have written ADA compliance policies or practices, they should be reviewed for conformity with the amended ADA and the EEOC's implementing regulations. If no such policies exist, the public entity should consider developing them.

❷ **Management Training.** Managers and supervisors should be trained on changes in the law and the public employer's updated policies. Particular focus should be placed on thinking broadly as to what is a "disability" and focus on reasonable accommodations.

❸ **Review and Update Job Descriptions.** Job descriptions often define what are the essential functions of a job, which can often determine the analysis of reasonable accommodations.

❹ **Document the Reasonable Accommodations Process.** Because the amended ADA has shifted the focus away from whether an employee has a disability to whether a reasonable accommodation has been provided, employers must create a clear record of its efforts to comply with requests for accommodations. Public employers should consider designating a person within the human resources group to receive, coordinate and document the reasonable accommodations process to ensure consistency and a documented record of the interactions between the public entity and the employee or applicant.

❺ **Become Cognizant of Non-Visible Disabilities.** Courts increasingly are citing non-visible disabilities – such as cancer, epilepsy/seizure disorders and diabetes. In such

situations, a denial of reasonable accommodations is often the focus of the dispute. The burden of disclosure of the disability initially rests with the affected employee, but once the public entity is on notice, the burden quickly can shift to the human resource management to address a request for a reasonable accommodation as to a condition not always commonly thought of as a "disability."

❻ **Master the Balancing Act on Emerging Issues.** Public employers need to strike a balance between workers' needs versus public entity's need to operate. For instance, employee leave is a recognized accommodation in certain circumstances, but it is far from clear that employee leave is "reasonable" in all situations. The resolution of these kinds of requests underscore that the amended ADA requires a fact-specific, individualized inquiry to determine whether an accommodation must be provided and it highlights the importance of the strategies listed above in making sure that public entity employers comply with the obligations under the ADA.

In summary, the amendments to the ADA are creating new protections for employees and new obligations for employers. This, in turn, will require public employers to develop new approaches to address these issues. In doing so, public entities will need to strike a balance between their workers' needs versus their own need to operate. What's more, public employers must be cognizant that their obligations may continue to shift in an uncertain legal climate. ■

*Michael Otworth, CPCU is a vice president and senior unit manager for the public entity claim division of Genesis Management and Insurance Services Corporation.*

*Benjamin C. Eggert, Esq. is a partner with Wiley Rein LLP.*



“ To help mitigate their risks, public entity human resource departments may consider a variety of activities, conducted in conjunction with legal counsel, to mitigate legal risks and exposures. ”

# GENESIS<sup>®</sup>

*Start with Security<sup>®</sup>*

*This information was compiled by Genesis Management and Insurance Services Corporation and is intended to provide background information to our clients, as well as to our professional staff. The information is time sensitive and may need to be revised and updated periodically. It is not intended to be legal advice. You should consult with your own legal counsel before relying on it. Genesis Insurance Company is licensed in the District of Columbia, Puerto Rico and all states. Genesis Insurance Company has its principal place of business in Stamford, CT and operates under NAIC Number 0031-38962. Insurance is placed with Genesis by licensed retail brokers/agents. Not all coverages described above are available in all states. Availability of coverage depends on underwriting qualifications and state regulations.*